

Seton Hall University eRepository @ Seton Hall

Law School Student Scholarship

Seton Hall Law

2010

Going Home with My(true)self at the End of the Night: How Jespersen v. Harrah's Turned Hard Facts Into Good Law By Respecting the Limits of Title VII and the Truth That Appearances Matter

Jacqueline Cuzzo
Seton Hall Law

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship



Part of the [Sexuality and the Law Commons](#)

Recommended Citation

Cuzzo, Jacqueline, "Going Home with My(true)self at the End of the Night: How Jespersen v. Harrah's Turned Hard Facts Into Good Law By Respecting the Limits of Title VII and the Truth That Appearances Matter" (2010). *Law School Student Scholarship*. 33.
https://scholarship.shu.edu/student_scholarship/33

GOING HOME WITH MY(TRUE)SELF AT THE END OF THE NIGHT: HOW *JESPERSEN v. HARRAH'S* TURNED HARD FACTS INTO GOOD LAW BY RESPECTING THE LIMITS OF TITLE VII AND THE TRUTH THAT APPEARANCES MATTER

I. INTRODUCTION

“Appearance rules the world.”¹

Little argument can be made that appearances do not matter, particularly in a society as media-driven and consumer-oriented as ours. We judge people based on their appearance, and this reality is relevant to the ways in which businesses operate. What is less clear, however, is the extent to which employers may regulate the appearance of their employees, particularly when such regulation consists of gender-differentiated appearance codes. While the Supreme Court has yet to hear a case challenging sex-discriminatory appearance codes, lower courts have attempted to walk a fine line between satisfying the mandates of Title VII² and maintaining some level of employer discretion in regulating employee appearance.

The Ninth Circuit has been particularly involved in the development of Title VII law as applied to dress and grooming requirements. In 2006, the court’s en banc decision³ rejecting a Harrah’s Casino employee’s claim that the company’s mandatory makeup requirement for women constituted sex discrimination proved especially controversial. Darlene Jespersen had been a bartender at Harrah’s in Reno for twenty years, during which time she compiled an exemplary record.⁴ But when the company decided to enforce a mandatory “Personal Best”

¹ FRIEDRICH SCHILLER

² Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e-2(a)(1)-(2) (2010), provides: “It shall be unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's* race, color, religion, *sex*, or national origin . . .” (emphasis added).

³ *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc).

⁴ *Id.* at 1107.

policy⁵ whereby male and female beverage service employees were required to comply with certain appearance standards, Jespersen's employment with Harrah's came to a screeching halt. Of the extensive guidelines set forth by Harrah's, there was one that Jespersen absolutely refused to follow: the requirement that all female bartenders wear face powder, blush, mascara, and lip color while at work.⁶ Jespersen did not wear makeup off the job and did not feel comfortable wearing it on the job, either, as she claimed it "conflict[ed] with her self-image" and "interfered with her ability to perform as a bartender."⁷ Having been released from her employment with Harrah's due to her unwillingness to comply with the "Personal Best" policy, Jespersen brought a Title VII action against Harrah's which has generated a slew of controversy and criticism among academics both inside and outside of the legal community.

⁵ The "Personal Best" policy provided, in relevant part:

All Beverage Service Personnel, in addition to being friendly, polite, courteous and responsive to our customer's needs, must possess the ability to physically perform the essential factors of the job as set forth in the standard job descriptions. They must be well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform. Additional factors to be considered include, but are not limited to, hair styles, overall body contour, and degree of comfort the employee projects while wearing the uniform.

Beverage Bartenders and Barbacks will adhere to these additional guidelines:

Overall Guidelines (applied equally to male/ female):

Appearance: Must maintain Personal Best image portrayed at time of hire. Jewelry, if issued, must be worn. Otherwise, tasteful and simple jewelry is permitted; no large chokers, chains or bracelets. No faddish hairstyles or unnatural colors are permitted.

Males:

Hair must not extend below top of shirt collar.. Ponytails are prohibited. Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted. Eye and facial makeup is not permitted. Shoes will be solid black leather or leather type with rubber (non skid) soles.

Females: Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times, no exceptions. Stockings are to be of nude or natural color consistent with employee's skin tone. No runs. Nail polish can be clear, white, pink or red color only. No exotic nail art or length. Shoes will be solid black leather or leather type with rubber (non skid) soles. *Make up (face powder, blush and mascara) must be worn and applied neatly in complimentary [sic] colors. Lip color must be worn at all times.*

Id. at 1107 (emphasis in original).

⁶ *Id.* at 1107-08.

⁷ *Id.*

Many critics have argued that the Ninth Circuit struck the wrong balance, paying an unreasonable amount of deference to employer preferences that perpetuate the objectification and subordination of women in the workplace.⁸ The soundness of this position rests on the premise that makeup has historically served to reinforce the stereotype that women are inferior beings whose primary value lies in their appearance. In this paper, I argue that the use of makeup in our society is not intrinsically linked to a history of female subordination, but rather reflects a social norm whose establishment, however deeply entrenched, does not implicate the concerns of Title VII. Moreover, given that Darlene Jespersen's case did not fit within the sex discrimination theories upon which she relied, a decision rendering Harrah's makeup requirement unlawful would have carved out a new area of protection that is relevant to Title VII concerns in only the most circuitous of ways: protection against discrimination based on appearance. By objecting to employer appearance codes on the basis that these codes conflict with one's autonomy or self-image, employees would have virtually unbridled discretion to look and dress however they pleased. Thus, had the Ninth Circuit provided such protection to Darlene Jespersen, it would have created a slippery slope whereby the lawfulness of *any* appearance requirement imposed on employees would become questionable.

This paper begins with an overview of Title VII sex discrimination jurisprudence. Dress and grooming code decisions analyzed under an undue burdens framework are discussed first, followed by a summary of the Supreme Court's watershed decision in *Price Waterhouse v. Hopkins*⁹ and the sex stereotyping cases that have emerged therefrom. The Ninth Circuit's

⁸ See, e.g., Diane Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 13 (2007); Hilary J. Bouchard, *Jespersen v. Harrah's Operating Co.: Employer Appearance Standards and the Promotion of Gender Stereotypes*, 58 ME. L. REV. 203 (2006); Alison J. Hartwell, *Makeup For Success: Why Jespersen v. Harrah's Stifles Diversity By Promoting Stereotypes in Employment*, 13 CARDOZO J.L. & GENDER 407 (2007); Allison T. Steinle, *Appearance and Grooming Standards as Sex Discrimination in the Workplace*, 56 CATH. U.L. REV. 261 (2006).

⁹ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

analysis in *Jespersen v. Harrah's* is then discussed against the backdrop of these cases. This overview is followed by an evaluation of the *Jespersen* Court's holding, as well as a discussion of the criticisms that have urged courts to provide greater protections for employees subject to dress and grooming standards, particularly when such standards are differentiated on the basis of sex. This paper concludes with the proposition that Darlene Jespersen's case did not demonstrate a clear case of sex discrimination, but rather is more appropriately viewed as an attack on employer regulation of employee appearance in general, the goal of which is problematic from both a legal and an ideological standpoint.

II. TITLE VII SEX DISCRIMINATION JURISPRUDENCE: THE UNEQUAL BURDENS TEST, *PRICE WATERHOUSE* SEX STEREOTYPING, AND THE *JESPERSEN V. HARRAH'S* DECISION

In *Jespersen v. Harrah's*, Darlene Jespersen relied on two theories of sex discrimination in arguing that Harrah's makeup requirement violated Title VII, alleging that the "Personal Best" policy discriminated against women by "(1) subjecting them to terms and conditions of employment to which men are not similarly subjected, and (2) requiring that women conform to sex-based stereotypes as a term and condition of employment."¹⁰ While Jespersen's first "unequal burdens"¹¹ claim was rooted in an already well-settled theory of employment discrimination, her second claim, based on the emerging "sex stereotyping" theory,¹² required a much more complex analysis due to the lower courts' inconsistent application of the theory since its inception in *Price Waterhouse v. Hopkins*.

¹⁰ *Jespersen*, 444 F.3d at 1108.

¹¹ *Id.*

¹² *Id.* at 1111.

A. THE UNEQUAL BURDENS THEORY OF TITLE VII SEX DISCRIMINATION

On its face, the text of Title VII provides that it is unlawful for an employer to discriminate against an individual with respect to the terms or conditions of employment because of that individual's sex.¹³ As one commentator has noted, "[t]his is a sweeping command, with great potential to eliminate employers' economic leverage as a factor perpetuating many types of discrimination."¹⁴ And while Title VII provides an exception to this antidiscrimination rule, allowing employers to hire and employ employees on the basis of sex "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonable necessary to the normal operation of that particulate business or enterprise,"¹⁵ this exception (hereinafter the "BFOQ exception") has generally been read narrowly by the courts.¹⁶

For example, in *Diaz v. Pan American World Airways*,¹⁷ the Fifth Circuit held that sex was not a BFOQ for the job of a flight attendant, despite the asserted superiority of women in being sexually attractive to male passengers and comforting female passengers, because these characteristics were peripheral to the airline's essential concern with safety and transportation.¹⁸ In interpreting the word "necessary" as it appears in the text of Title VII's BFOQ exception, the court stated that the test is one of "business *necessity*," not "business *convenience*."¹⁹ The court

¹³ See 42 U.S.C.S. 2000e-2(a)(1)-(2) (2010).

¹⁴ David B. Cruz, *Making Up Women: Casinos, Cosmetics, and Title VII*, 5 NEV. L.J. 240, 243 (2004).

¹⁵ 42 U.S.C.S. § 2000e-2(e)(1) (2010) (providing an exception for employment decisions on the basis of religion and national origin, as well as sex).

¹⁶ See, e.g., *Int'l Union, UAW v. Johnson Controls*, 499 U.S. 187, 201 (1991). The Supreme Court described the limited applicability of the BFOQ exception as follows:

The wording of the BFOQ defense contains several terms of restriction that indicate that the exception reaches only special situations in which discrimination is permissible to "certain instances" where sex discrimination is "reasonably necessary" to the "normal operation" of the "particular" business. Each one of these terms – certain, normal, particular – prevents the use of general subjective standards and favors an objective, verifiable requirement. But the most telling term is "occupational"; this indicates that these objective, verifiable requirements must concern job-related skills and aptitudes.

¹⁷ *Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971).

¹⁸ *Id.* at 388.

¹⁹ *Id.* (emphases in original).

explained further that “discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one test exclusively,” and went on to hold that “because the non-mechanical aspects of the job of flight cabin attendant are not ‘reasonably necessary to the normal operation’ of Pan Am’s business, Pan Am cannot exclude *all* males simply because *most* males may not perform adequately,” regardless of customer preference for female flight attendants.²⁰

Despite the far-reaching language of Title VII’s antidiscrimination mandate and the limited circumstances under which the BFOQ exception applies, sex-differentiated dress and grooming codes have largely evaded the proscriptions of Title VII because courts have been reluctant to find that such requirements discriminate against employees “because of” sex as envisioned by Title VII.²¹ However, where courts have found that a policy created an “unequal burden” for one gender, such policies have been struck down as violative of Title VII’s ban on sex discrimination. For example, in *Carroll v. Talman Fed. Sav. & Loan Ass’n of Chi.*,²² the Seventh Circuit addressed a policy which required female employees at a savings and loans association to wear uniforms, while male employees were merely required to maintain business attire. The rationale advanced by the employer for its separate dress codes was that it feared women could not be trusted to choose appropriate work attire, and was specifically concerned

²⁰ *Id.* at 388-89 (emphases in original).

²¹ *See, e.g.*, *Harper v. Blockbuster Entm’t Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998) (dismissing a challenge to a policy that prohibited men, but not women, from having long hair); *Tavora v. N.Y. Mercantil Exch.*, 101 F.3d 907, 908 (2d Cir. 1996) (upholding an employer policy that required male employees to have short hair but did not require the same for female employees); *Wislocki-Goin v. Mears*, 831 F.2d 1374, 1380 (7th Cir. 1987) (dismissing a Title VII claim alleging that a grooming policy imposed unduly harsh requirements on women); *Fountain v. Safeway Stores*, 555 F.2d 753, 755-56 (9th Cir. 1977) (permitting a requirement that male, but not female, employees wear ties); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1336 (D.C. Cir. 1973) (upholding a restriction prohibiting long hair on male employees but allowing long hair on female employees as not discriminating on the basis of sex); *Austin v. Wal-Mart Stores, Inc.*, 20 F.Supp. 2d 1254, 1257 (finding a grooming policy requiring male employees to maintain hair length above the collar acceptable under Title VII); *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 231 (S.D.N.Y. 1981) (upholding a policy “that prohibits to both sexes a style more often adopted by members of one sex” under a Title VII challenge).

²² *Carroll v. Talman Fed. Sav. & Loan Ass’n of Chi.*, 604 F.2d 1028 (7th Cir. 1979)

that women would wear skirts that the employer considered inappropriately revealing.²³ In holding that the employer’s differential policy was “based on offensive stereotypes prohibited by Title VII,” the court discussed how such disparate treatment was demeaning to female employees, reasoning that “[w]hile there is nothing offensive about uniforms Per se, when some employees are uniformed and others not there is a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes.”²⁴

In the Ninth Circuit, the unequal burdens test has been developed in the context of several airline cases addressing sex-differentiated weight restrictions for male and female employees. In *Gerdom v. Continental Airlines, Inc.*,²⁵ the court considered Continental’s imposition of strict weight regulations for its female flight attendants, in the absence of any corresponding weight restriction for male employees who performed the same or similar job functions. Touted by the airline as a policy intended to “create the public image of an airline which offered passengers service by thin, attractive women,” the court found that it imposed a “significantly greater burden of compliance” on women, thereby resulting in sex discrimination.²⁶ In the more recent case of *Franks v. United Airlines, Inc.*,²⁷ the Ninth Circuit similarly invalidated a weight policy that imposed different standards for men and women in a way that applied less favorably to one gender. While United’s weight maximums for female flight attendants corresponded to a medium body frame standard, the maximums for male flight attendants generally corresponded to a large body frame standard.²⁸ Recognizing that “an appearance standard that imposes

²³ *Id.* at 1033.

²⁴ *Id.*

²⁵ *Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1982).

²⁶ *Id.* at 604, 606

²⁷ *Franks v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2001).

²⁸ *Id.* at 854.

different but essentially equal burdens on men and women is not disparate treatment,” the court nevertheless found that United’s policy imposed greater burdens upon female employees, as evidenced by the policy itself.²⁹

Despite the Ninth Circuit’s familiarity with the unequal burdens test in the context of physical requirements such as weight restrictions, unequal burdens imposed by a sex-differentiated appearance code might also arise in the form of disparate costs or time required to comply with a policy.³⁰ Indeed, Darlene Jespersen relied upon both of these arguments in her case against Harrah’s, though these arguments ultimately proved unsuccessful.³¹

B. PRICE WATERHOUSE V. HOPKINS AND THE DEVELOPMENT OF SEX STEREOTYPING THEORY

First articulated by the Supreme Court in the 1989 case *Price Waterhouse v. Hopkins*,³² sex-stereotyping theory is a relatively recent and largely unresolved area of Title VII jurisprudence. In *Price Waterhouse*, Ann Hopkins was a senior manager at a nationwide accounting firm who had been selected for potential partnership.³³ Although the firm’s partners and Hopkin’s clients agreed that she was “extremely competent, intelligent,” “energetic and creative” and an “outstanding professional,”³⁴ her partnership was ultimately denied. Many of the partners who objected to Hopkin’s candidacy did so on account of her aggressive, “macho” personality,³⁵ and she was told that her chances for partnership would improve if she would “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her

²⁹ *Id.*

³⁰ See Michael Selmi, *The Many Faces of Darlene Jespersen*, 14 DUKE J. GENDER L. & POL’Y 467, 470-71 (2007).

³¹ See *infra* Part II.C.2.

³² *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

³³ *Id.* at 231.

³⁴ *Id.* at 234.

³⁵ *Id.* at 235.

hair styled, and wear jewelry.”³⁶ Hopkins subsequently brought a Title VII claim against Price Waterhouse, alleging that the firm discriminated against her on the basis of sex as to decisions regarding the partnership.³⁷

While *Price Waterhouse* is often recognized as having established the “Mixed Motive” defense in Title VII cases,³⁸ its expansion of the scope of Title VII to “sex stereotyping” has also been influential in providing an alternative legal theory for Title VII plaintiffs.³⁹ In finding that sex stereotypes played an impermissible role in Hopkin’s performance evaluations, Justice Brennan clarified the term “sex stereotyping” as it applies to Title VII:

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes” An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they did not. Title VII lifts women out of this bind The plaintiff must show that the employer actually relied on her gender in making its decisions. In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part.⁴⁰

But while the Court in *Price Waterhouse* clearly announced that evidence of sex stereotyping is relevant to the sex discrimination inquiry, it has been a difficult case for lower courts to apply due to the Court’s unwillingness to clarify the standard of proof required to establish that sex

³⁶ *Id.* (quoting findings made by the District Court for the District of Columbia in the decision below, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).

³⁷ *Id.* at 231.

³⁸ In the context of sex discrimination law, “mixed motive” refers to the principle that once a plaintiff has established that gender played “a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff’s gender into account.” *Price Waterhouse*, 490 U.S. at 258.

³⁹ See Steinle, *supra* note 8, at 275.

⁴⁰ *Price Waterhouse*, 490 U.S. at 251 (quoting *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

stereotyping played a part in an employment decision.⁴¹ Therefore, it is unsurprising that the *Jespersen* Court so easily distinguished *Price Waterhouse* in rejecting Jespersen's sex stereotyping claim.⁴²

The *Price Waterhouse* sex stereotyping theory has been met with the greatest success in the context of same-sex harassment claims.⁴³ It was the Supreme Court's decision in *Oncale v. Sundower Offshore Services, Inc.*,⁴⁴ in combination with the groundwork laid by *Price Waterhouse*, that sparked an interest in the development of this theory.⁴⁵ In *Oncale*, the plaintiff worked on an eight-man oil platform crew and alleged that he was harassed by his co-workers because he was effeminate and thus "failed to meet the image of what a man should be like."⁴⁶ Although the thrust of the Court's holding was its announcement that sex discrimination consisting of same-sex sexual harassment is cognizable under Title VII,⁴⁷ *Oncale* also illustrated, however implicitly, that extreme reactions to what is perceived to be gender-inappropriate behavior can result in legal exposure under Title VII.⁴⁸

In *Nichols v. Azteca Restaurant Enterprises*, the Ninth Circuit relied upon both *Price Waterhouse* and *Oncale* in holding that the plaintiff stated a viable claim based on sex stereotyping theory that he was "discriminated against for acting too feminine."⁴⁹ The plaintiff, a waiter at Azteca Restaurant, alleged that he was subjected to persistent harassment by

⁴¹ See *id.* at 252 ("[W]e do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decisions, and we refrain from deciding here which specific facts . . . would or would not establish a plaintiff's case."); see also Hartwell, *supra* note 8, at 424; Steinle, *supra* note 8, at 276 (noting that "[l]ower courts must rely on the specific facts of *Price Waterhouse* and the Court's vague language in determining how far the *Price Waterhouse* decision extends, and in what contexts it applies.").

⁴² See *infra* Part II.C.3.

⁴³ See Selmi, *supra* note 30, at 473.

⁴⁴ *Oncale v. Sundower Offshore Servs.*, 523 U.S. 75 (1998).

⁴⁵ Selmi, *supra* note 30, at 474.

⁴⁶ *Id.* at 473.

⁴⁷ See *Oncale*, 523 U.S. at 82.

⁴⁸ See 10-261 Lab. & Employ. L., *Dress, Grooming, and Appearance Guidelines*, MB § 261.03 (2010).

⁴⁹ *Nichols v. Azteca Restaurant Enters.*, 256 F.3d 864, 874 (9th Cir. 2001).

his co-workers because he “failed to conform to a male stereotype.”⁵⁰ The court described this harassment in the following terms:

[T]he systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act. Sanchez was attacked for walking and carrying his tray “like a woman” - i.e., for having feminine mannerisms. Sanchez was derided for not having sexual intercourse with a waitress who was his friend. Sanchez's male co-workers and one of his supervisors repeatedly reminded Sanchez that he did not conform to their gender-based stereotypes, referring to him as “she” and “her.” And, the most vulgar name-calling directed at Sanchez was cast in female terms.⁵¹

Concluding that the abuse was closely linked to gender and therefore violated the *Price Waterhouse* rule barring discrimination on the basis of sex stereotypes,⁵² the Ninth Circuit drew upon much of the same reasoning underlying *Oncale*, but in such a way that gave explicit recognition to stereotyping theory.⁵³

In other circuits that have decided sex stereotyping cases, these cases have generally dealt with plaintiffs whose claims have somehow implicated their sexual orientation and/or sexual practices.⁵⁴ This has created a fundamental incoherence in that Title VII does not offer protection for discrimination on the basis of sexual orientation, yet sexual orientation has served

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ See *Selmi*, *supra* note 30, at 474-75. For a similar case in which the Ninth Circuit held that sex stereotyping theory provided a grounds for relief under Title VII, regardless of the fact that the plaintiff stated he was harassed because he was gay rather than because of stereotyping, see *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (en banc).

⁵⁴ See, e.g. *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (holding that a transsexual fire fighter who expressed a more feminine appearance when undergoing treatment for Gender Identity Disorder and who was subsequently driven out of the department by his superiors stated a Title VII claim for his “failure to conform to sex stereotypes concerning how a man should look and behave”); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (applying *Salem* to affirm a verdict of \$575,00 based on a sex-stereotyping claim for a pre-operative transsexual police officer who was denied a promotion for not being masculine enough); *but see Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006) (rejecting plaintiff’s sex stereotyping claim and finding that the harassment of which plaintiff complained was more properly viewed as harassment based on his perceived homosexuality, rather than based on gender non-conformity, and thus not protected by Title VII).

as a relevant factor in determining whether sex stereotyping occurred.⁵⁵ In any event, because Darlene Jespersen's claim focused on her appearance rather than her perceived sexual orientation, it is difficult to analogize her case to the recent trends in gender stereotyping jurisprudence.

C. THE NINTH CIRCUIT'S DECISION IN *JESPERSEN V. HARRAH'S OPERATING CO.*

1. Facts and Procedural History

Darlene Jespersen was by all accounts a spectacular bartender during her twenty year tenure at Harrah's Casino,⁵⁶ which began in 1979 and came to an unfortunate end in 2000.⁵⁷ Throughout Jespersen's entire term of employment, the company maintained a policy encouraging female beverage servers to wear makeup on the job.⁵⁸ It was not until 2000, however, that the policy became mandatory,⁵⁹ thereby precipitating her termination by and subsequent lawsuit against Harrah's. The "Personal Best" program at issue in her case contained certain appearance standards that applied equally to both male and female employees, including a "standard uniform of black pants, white shirt, black vest, and black bow tie."⁶⁰ However, the policy also included several sex-differentiated requirements pertaining to hair, nails, and makeup.⁶¹ For example, male employees' hair could not extend below the top of the shirt collar, and female employees' hair had to be teased, curled, or styled every day.⁶² Of the comprehensive guidelines set forth by the "Personal Best" program, there was only one provision

⁵⁵ See Selmi, *supra* note 30, at 479 (observing that recent gender stereotyping cases have "restored the confusion *Oncale* was intended to eliminate" because "the courts are again evaluating the plaintiff's sexual orientation, as well as the identities of the harassers, to determine whether a claim is cognizable," and arguing that the extension of Title VII to discrimination based on sexual orientation would simplify the law).

⁵⁶ See *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1118 (9th Cir. 2006) (Kozinski, J., dissenting) (en banc) (describing Jespersen as a "valued, experienced employee who had gained accolades from her customers").

⁵⁷ See *Jespersen v. Harrah's Operating Co.*, 280 F.Supp. 2d 1189, 1190 (D.Nev. 2002).

⁵⁸ *Jespersen*, 444 F.3d at 1107.

⁵⁹ *Id.*

⁶⁰ *Id.* For a detailed version of the policy's relevant appearance guidelines, see *supra* note 5.

⁶¹ *Id.*

⁶² *Id.*

to which Darlene Jespersen was adamantly opposed: the requirement that all female bartenders wear makeup.⁶³

The provision specifically provided that for female bartenders, “[m]akeup (face powder, blush and mascara) must be worn and applied neatly and in complementary colors,” and “[l]ip color must be worn at all times.”⁶⁴ Darlene Jespersen, a “nearly six-foot tall, broad-shouldered woman with a down to earth persona,”⁶⁵ did not wear makeup off the job, and soon found that she could not wear it on the job without sacrificing her performance as a bartender.⁶⁶ Jespersen found makeup both uncomfortable and incompatible with her self-image, and she therefore refused to comply with the company’s policy.⁶⁷ Harrah’s subsequently released Jespersen from her employment, and she thereafter brought suit against the company on the grounds that the “Personal Best” program discriminated against women by subjecting them to unduly burdensome conditions of employment and requiring them to women conform to sex-based stereotypes.⁶⁸

The district court granted Harrah’s motion for summary judgment on all of Jespersen’s claims,⁶⁹ and a three-judge panel for the Ninth Circuit affirmed.⁷⁰ The panel held that although grooming policies could violate Title VII as a matter of law, Jespersen nevertheless failed to show that the “Personal Best” program imposed a greater burden on women than on men.⁷¹ Moreover, the panel interpreted *Price Waterhouse* as applying to appearance standards only in situations where the policy amounted to sexual harassment, which required a showing that the

⁶³ *Id.* at 1107.

⁶⁴ *Jespersen*, 444 F.3d at 1107.

⁶⁵ Jennifer C. Pizer, *Facial Discrimination: Darlene Jespersen’s Fight Against the Barbie-fication of Bartenders*, 14 DUKE J. GENDER L. & POL’Y 285, 285 (2007).

⁶⁶ *Jespersen*, 444 F.3d at 1107-08.

⁶⁷ *Id.* at 1108.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1106 (citing *Jespersen v. Harrah’s Operating Co.*, 280 F.Supp. 2d 1189 (D.Nev. 2002)).

⁷⁰ *Id.* (citing *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076 (9th Cir. 2004)).

⁷¹ *Id.* (citing *Jespersen*, 392 F.3d at 1081-82).

plaintiff suffered harassment for failure to conform to gender stereotypes.⁷² The Ninth Circuit thereafter took the case en banc, reaffirming the judgment of district court and panel majority on somewhat different grounds.⁷³

2. The Unequal Burdens Claim: An Insufficient Record Proves Fatal

The first claim advanced by Jespersen was that by subjecting women to terms and conditions of employment to which men were not similarly subjected, Harrah's "Personal Best" policy created an unequal burden on women which amounted to sex discrimination.⁷⁴ The court rejected Jespersen's argument that the makeup requirement itself was sufficient to establish a prima facie case of discriminatory intent that must be justified by Harrah's as a BFOQ,⁷⁵ stating that the settled law "does not support [the] position that a sex-based difference in appearance standards alone, without any further showing of disparate effects, creates a prima facie case."⁷⁶ Citing *Gerdorn v. Continental* and *Frank v. United*, the court conceded that some grooming and appearance policies may place a greater burden on one gender than another in violation of Title VII, but held that it could not find as such here without further evidence of the burdensome nature of Harrah's makeup requirement.⁷⁷ It described the policy in *Gerdorn*, where the weight restriction was "part of an overall program to create a sexual image for the airline," as clearly distinguishable from Harrah's policy, which "applied to both male and female bartenders, and

⁷² *Jespersen*, 444 F.3d at 1106 (citing *Jespersen*, 392 F.3d at 1082-83, which relied on *Nichols v. Azteca Restaurant Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001) and *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (en banc)).

⁷³ *Id.*

⁷⁴ *Id.* at 1108.

⁷⁵ *Id.* at 1109. As noted by the *Jespersen* Court at the start of its analysis, the Supreme Court established a three-step framework for analyzing discrimination claims under Title VII in *McDonnell Douglas Corp. v. Greene*, 411 U.S. 792, 802-05 (1973). In order to prove disparate treatment discrimination: (1) the plaintiff must provide prima facie evidence of disparate treatment on the basis of a protected characteristic, such as sex; (2) if a prima facie showing is made, the defendant has the opportunity to demonstrate a legitimate, nondiscriminatory reason for the treatment, and (3) if the defendant offers such proof, the plaintiff must show that the reason offered by the defendant is merely a pretext.

⁷⁶ *Id.*

⁷⁷ *Id.*

was aimed at creating a professional and very similar look for all of them.”⁷⁸ Citing to a long list of cases which have recognized that employers may adopt grooming standards that appropriately differentiate between the genders, the *Jespersen* Court refused to accept that Harrah’s policy, on its face, amounted to anything more than “slight differences in appearance requirements for males and females” that “have only a negligible effect on employment opportunities.”⁷⁹

Jespersen’s failure to create a record establishing that the “Personal Best” program was unduly burdensome for female employees thus foreclosed any chance of success under this theory. Refusing to take judicial notice of the fact that “it costs more money and takes more time for a woman to comply with the makeup requirement than it takes for a man to comply with the requirement that he keep his hair short,” the court indicated that documentation or other evidence of the relative cost and time required by men and women to comply with Harrah’s policy was necessary for a prima facie showing of unequal burdens.⁸⁰

3. The Sex Stereotyping Claim: Failing to Fit Within the Legal Framework

As the case law on stereotyping theory suggests,⁸¹ Darlene Jespersen’s second claim alleging that the “Personal Best” program discriminated against women by requiring them to conform to sex-based stereotypes⁸² was a far more difficult concept for the *Jespersen* Court to apply, as Jespersen’s case did not fit neatly within the existing legal framework.⁸³ Ultimately, the court relied on factual distinctions between *Price Waterhouse* and subsequent Ninth Circuit cases interpreting sex stereotyping theory in the context of Title VII, as well as its independent judgment that the record failed to establish evidence of stereotypical motivation by Harrah’s, to

⁷⁸ *Jespersen*, 444 F.3d at 1109.

⁷⁹ *Id.* at 1110 (quoting *Knott v. Missouri P.R. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975)).

⁸⁰ *Id.*

⁸¹ See *supra* Part II.B.

⁸² *Jespersen*, 444 F.3d at 1108.

⁸³ See *Selmi*, *supra* note 30, at 468.

reject Jespersen’s claim that the makeup requirement constituted unlawful discrimination due to sex stereotyping.⁸⁴

The court began by reciting the holding in *Price Waterhouse* that in order to establish that “‘gender played a motivating part in an employment decision,’ a plaintiff in a Title VII case may introduce evidence that the employment decision was made in part because of a sex stereotype.”⁸⁵ Nevertheless, the court found *Price Waterhouse* distinguishable in that the stereotyping to which Ann Hopkins was subjected rightfully interfered with her ability to perform at work.⁸⁶ Because the criticisms of Hopkins’ superiors, such as the recommendation that she “take ‘a course at charm school,’”⁸⁷ were intended to discourage the aggressive behavior that allowed her to achieve professional success in the first place, impermissible sex stereotyping was clear since “the very traits that she was asked to hide were the same traits considered praiseworthy by men.”⁸⁸ Harrah’s policy, on the other hand, did not single out Jespersen the way Hopkins had been singled out in *Price Waterhouse*, and “there was nothing to suggest the grooming standards would objectively inhibit a women’s ability to do the job.”⁸⁹ Moreover, in viewing the makeup requirement in the context of the *overall* “Personal Best” program, the court stated there was “no evidence . . . to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear.”⁹⁰ The court felt that the only evidence of stereotyping offered by Jespersen was her “own

⁸⁴ *Jespersen*, 444 F.3d at 1111-13.

⁸⁵ *Id.* at 1111 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989)).

⁸⁶ *Id.*

⁸⁷ *Id.* (quoting *Price Waterhouse*, 490 U.S. at 251).

⁸⁸ *Id.*

⁸⁹ *Id.* at 1111-12.

⁹⁰ *Jespersen*, 444 F.3d at 1112.

subjective reaction to the makeup requirement,”⁹¹ which was clearly insufficient to support her claim.

Acknowledging its respect for Jespersen’s “resolve to be true to herself and to the image that she wishes to project to the world,” the Ninth Circuit went on to reason that if Jespersen’s personal objection to the makeup requirement alone were enough to support a sex stereotyping claim, the court would “come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her self-image, can create a triable issue of sex discrimination.”⁹² The court conceded that had Harrah’s intended its policy to be sexually provocative or portray its female bartenders as sex objects, Jespersen would have had a viable claim.⁹³ In actuality, however, Jespersen was required to wear a unisex uniform that covered her entire body⁹⁴ – a far cry from what most would consider provocative or sexy.

Turning to cases from the Ninth Circuit that have addressed sex stereotyping claims after *Price Waterhouse*, the *Jespersen* Court then distinguished the case at bar from those where sexual harassment had occurred. In *Nichols v. Azteca Restaurant* and *Rene v. MGM Grand Hotel*, the Ninth Circuit had applied *Price Waterhouse*’s holding that “sexual harassment of an employee because of that employee’s failure to conform to commonly-accepted gender stereotypes is sex discrimination in violation of Title VII.”⁹⁵ Both cases dealt with claims that the plaintiff had endured harassment for failing to “act as a man should act”⁹⁶ or “conform to

⁹¹ *Id.*.

⁹² *Id.*.

⁹³ *Id.* (distinguishing the case at bar from *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 604 (S.D.N.Y. 1981), where an employer’s dress code required a female lobby attendant to wear a uniform that was “short and revealing . . . [such that her] thighs and portions of her buttocks were exposed”) (alteration in original).

⁹⁴ *Id.*.

⁹⁵ *Id.*.

⁹⁶ *Jespersen*, 444 F.3d at 1113 (quoting *Nichols v. Azteca Restaurant Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001)).

commonly-accepted male stereotypes.”⁹⁷ Despite the fact that *Nichols* and *Rene* did not involve dress or grooming codes, the court stated that those cases nevertheless “provide the framework for this court’s analysis of when sex stereotyping rises to the level of sex discrimination,” and found that Jespersen’s case was conceptually inconsistent because “Harrah’s actions [did] not condone[] or subject[] Jespersen to any form of alleged harassment.”⁹⁸ Moreover, unlike the plaintiff in *Price Waterhouse*, the court found that Jespersen had not been treated any differently than the other Harrah’s bartenders (both male and female), and therefore considered her claim materially different than Ann Hopkins’ insofar as Harrah’s appearance guidelines “[did] not require Jespersen to conform to a stereotypical image that would *objectively* impede her ability to perform her job requirements as a bartender.”⁹⁹ Although the court acknowledged that a cognizable claim of sex stereotyping on the basis of appearance codes is possible, it ultimately held that Jespersen failed to provide sufficient evidence that such a violation occurred here:

This record . . . is devoid of any basis for permitting this particular claim to go forward, as it is limited to the subjective reaction of a single employee, and there is no evidence of a stereotypical motivation on the part of the employer. This case is essentially a challenge to one small part of what is an overall apparel, appearance, and grooming policy that applies largely the same requirements to both men and women [I]n commenting on grooming standards, the touchstone is reasonableness. A makeup requirement must be seen in the context of the overall standards imposed on employees in a given workplace.¹⁰⁰

4. The Dissents: Expanding *Price Waterhouse* and Appreciating Women’s Makeup Woes

Of the eleven circuit judges who heard oral argument, four judges dissented in two separate opinions. Judge Pregerson agreed with the majority that Jespersen failed to create a sufficient record in support of her unequal burdens claim.¹⁰¹ However, he challenged the

⁹⁷ *Id.* (discussing *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1064-65 (9th Cir. 2002) (en banc)).

⁹⁸ *Id.*

⁹⁹ *Id.* (emphasis added).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (Pregerson, J., dissenting) (en banc).

majority's finding that Harrah's policy was not motivated by sex stereotypes, and felt that "[q]uite simply, her termination for failing to comply with a grooming policy that imposed a facial uniform on only female bartenders [was] 'because of sex'" and therefore incompatible with Title VII's demand that "'gender must be *irrelevant* to employment decisions.'" ¹⁰² Looking to the language of *Price Waterhouse*, Judge Pregerson considered Jespersen's failure to present additional evidence immaterial to her second claim, arguing that "little is required to make out a sex-stereotyping – as distinct from an undue burden – claim in this situation." ¹⁰³ Because *Price Waterhouse* refused to delineate the type or quantity of evidence required for a prima facie showing of sex stereotyping, the judge deemed "the fact that Harrah's designed and promoted a policy that required women to conform to a sex stereotype by wearing full makeup" sufficient evidence of discrimination. ¹⁰⁴

Criticizing the majority's failure to consider the makeup requirement separately, Judge Pregerson worried that analyzing the policy through such a broad lens allowed the discriminatory nature of the makeup requirement to be disregarded when considered in light of other provisions of the policy that either had burdensome effects on the opposite gender or applied to both genders in a neutral way. ¹⁰⁵ The judge interpreted Harrah's makeup requirement as demeaning to women in much the same way as the female-only uniform policy in *Carroll v. Talman*, attributing Harrah's actions to the "cultural assumption – and gender-based stereotype – that women's faces are incomplete, unattractive, or unprofessional without full makeup." ¹⁰⁶

¹⁰² *Jespersen*, 444 F.3d at 1114 (Pregerson, J., dissenting) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989)).

¹⁰³ *Id.* (Pregerson, J., dissenting).

¹⁰⁴ *Id.* at 1114-15 (Pregerson, J., dissenting).

¹⁰⁵ *Id.* at 1116 (Pregerson, J., dissenting).

¹⁰⁶ *Id.* (Pregerson, J., dissenting).

Judge Kozinski similarly took issue with the majority’s treatment of Jespersen’s stereotyping claim, but also wrote a separate dissent to voice his disagreement with the finding that Jespersen did not present sufficient evidence that the makeup requirement created an unequal burden for women.¹⁰⁷ The judge argued that judicial notice should have been taken of the substantial time and costs associated with the makeup requirement relative to the corresponding grooming requirements for men, reasoning that “[y]ou don’t need an expert witness to figure out that [makeup doesn’t] grow on trees . . . [n]or is there any rational doubt that the application of makeup is an intricate and painstaking process that requires considerable time and care.”¹⁰⁸

Notwithstanding his disagreement with the majority’s refusal to take judicial notice, Judge Kozinski also argued that Jespersen’s testimony that she found it burdensome to wear makeup because it conflicted with her self-image and interfered with her job performance constituted relevant evidence to the unequal burdens inquiry which should not have been dismissed.¹⁰⁹ Emphasizing the “intensely personal choice” involved in wearing cosmetics, the judge described women’s makeup-wearing as a “cultural artifact” and implied that this cultural norm should give way to less antiquated notions of what a “real women” look like.¹¹⁰

III. AN EVALUATION OF *JESPERSEN V. HARRAH*’S: RESPECTING THE LIMITS OF TITLE VII’S REACH

A. THE UNEQUAL BURDENS CLAIM

Despite Judge Kozinski’s appeal for judicial notice that Harrah’s makeup requirement imposed certain onerous burdens on female employees, the majority’s finding that Jespersen failed to provide sufficient evidence that a significant burden of compliance attended the makeup

¹⁰⁷ *Id.* at 1117 (Kozinski, J., dissenting) (en banc).

¹⁰⁸ *Jespersen*, 444 F.3d at 1117 (Kozinski, J., dissenting).

¹⁰⁹ *Id.* (Kozinski, J., dissenting).

¹¹⁰ *Id.* at 1117-18 (Kozinski, J., dissenting).

requirement, but not any corresponding grooming requirement for male employees, was consistent with the settled law addressing unequal burdens in the context of Title VII. As touched upon by the court,¹¹¹ had Jespersen been required to wear a particularly suggestive outfit or been similarly objectified in complying with Harrah's policy, the court would likely have been receptive to her claim.¹¹² But Jespersen did not claim that the policy's unequal burden stemmed from Harrah's attempts to "sex her up" in order to increase business,¹¹³ and the court was therefore justified in treating her case like those where the courts condoned sex-differentiated grooming policies absent tangible evidence that the policies imposed a greater burden of compliance on one gender. Under this framework, and refusing to take judicial notice of the strains on time and cost associated with wearing makeup, Jespersen's undeveloped record was fatal to her unequal burdens claim.

An argument may be made that the Ninth Circuit was overly pragmatic in its unequal burdens analysis, failing to consider the emotional and/or psychological detriments that women like Jespersen suffer as a result of mandatory makeup policies.¹¹⁴ But this line of reasoning fails to recognize that asking courts to engage in such a delicate inquiry may not only be difficult, but altogether unfeasible. As one legal scholar was apt to point out, "we should be skeptical of courts' ability . . . to discern uncomparable burdens, particularly because the burdens may actually be incommensurable."¹¹⁵ Because Jespersen's case hinged largely on her psychological reaction to Harrah's policy, the undue burdens test was simply an inappropriate avenue for relief. The incongruity of this framework to the facts in *Jespersen* was actually conceded by an attorney

¹¹¹ See *id.* at 1112 (distinguishing *EEOC v. Sage Realty Corp.*, 507 F.Supp. 599 (S.D.N.Y. 1981)).

¹¹² See *Selmi*, *supra* note 30, at 471.

¹¹³ See *id.* (conceding that such a claim would have otherwise been consistent with the history of bartending and citing to *Avery & Crain*, *supra* note 8).

¹¹⁴ See *Bouchard*, *supra* note 8, at 217-18 ("[B]ecause the way that one chooses to present herself physically can be 'critical to [her] sense of dignity and self,' judges should consider these described intangible effects of employer appearance codes before 'weighing' the burden it imposes on an employee.") (footnote omitted).

¹¹⁵ See *Cruz*, *supra* note 14, at 247.

who had represented Jespersen in her appeal to the Ninth Circuit's panel, as this attorney explained how "the more we considered the 'equal burdens' test, the more the exercise of comparing very different 'burdens' seemed illogical and incoherent."¹¹⁶

Moreover, as asserted by Michael Selmi in his analysis of *Jespersen v. Harrah's*, whether the court was right as to the unequal burdens claim is probably insignificant in the grand scheme of Jespersen's case.¹¹⁷ Selmi explains this position as follows:

If she had prevailed on the unequal burdens argument, the policy may very well have stayed in place, with the company perhaps supplying the makeup to reduce the cost burden on women. The company might also have reacted by increasing the burdens on the male employees, perhaps by requiring them to shave daily, put gel in their hair, or something along those lines. Similarly, prevailing on the undue burdens tests would not have advanced the law; rather, this would have been an application of a limited but well-established legal principle.¹¹⁸

Therefore, while the Ninth Circuit's unequal burdens analysis in *Jespersen* is somewhat unsatisfying in its overly-formalistic approach, the court was constrained by the doctrinal limitations of the legal theory advanced, and the unequal burdens claim nevertheless proved to be a less important aspect of the case in the overall context of evolving Title VII jurisprudence.

B. THE SEX STEREOTYPING CLAIM

The far more complicated issue in *Jespersen* was whether Harrah's makeup policy constituted sex discrimination on the basis of sex stereotyping as envisioned by Title VII and set forth in *Price Waterhouse*. The facts in *Jespersen* did not fit neatly within the existing line of cases interpreting the Supreme Court's expanded view of Title VII protection, which has generally applied stereotyping theory to harassment or other adverse employment actions

¹¹⁶ Pizer, *supra* note 65, at 303.

¹¹⁷ See Selmi, *supra* note 30, at 471.

¹¹⁸ *Id.*

directed at an individual on the basis of his or her perceived gender nonconformity.¹¹⁹ The Ninth Circuit was reasonable to point out the conceptual difficulties in attempting to apply the *Price Waterhouse* theory to the unfamiliar context of appearance codes, and was warranted in distinguishing *Jespersen* on that basis.

However, the additional justification for its holding, that “[t]here is no evidence . . . to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear,”¹²⁰ is at first hard to swallow. Many critics have argued that the *Jespersen* decision perpetuates and reinforces harmful stereotypes of women as merely “ornamental, objects of beauty to be contemplated, not agents with talents to be esteemed.”¹²¹ Although this position is not without reason, it nevertheless overstates the symbolic significance of makeup in our society and understates its practical significance in attractiveness judgments. In the absence of convincing evidence that makeup serves a more significant social function than as a marker of attractiveness, but rather continues to operate as an emblem of women’s inferiority, the courts should not be expected to eradicate appearance codes in the workplace merely because they embrace socially constructed, gender-differentiated appearance norms.

¹¹⁹ See *supra* Part II.B. Moreover, these cases have usually favored plaintiffs whose perceived gender nonconformity is based on characteristics that are generally considered immutable, such as behavior or sexual orientation. The conduct at issue in *Jespersen* - wearing makeup at work - is obviously not immutable, and therefore more closely resembles cases such as those where employees were required to change their hairstyles, which the courts have generally allowed.

¹²⁰ *Jespersen*, 444 F.3d at 1112.

¹²¹ Cruz, *supra* note 14, at 248. See also Hartwell, *supra* note 8, at 434-35. In analyzing the *Jespersen* holding, Hartwell writes:

[T]here may not be the need for additional evidence that the policy was intended to force women to conform to a stereotype. The policy on its face, in the specific requirements it imposes on women's faces, is evidence of a stereotype. The specificity of the makeup applied to women's faces is a certain stereotype of womanhood: the woman as a decorative object. The policy does not require that women maintain a professional complexion and/or prohibit any unusual looks - as it did with jewelry and hair style - which would have allowed women to wear little to no makeup, or a full face of makeup if they so desired, but allows Harrah's to maintain a professional-looking staff. Instead Harrah's required women to wear foundation, blush, mascara and lip color - a very specific image of female beauty.

Feminist scholars have made much of the damaging impact of beauty practices on women, and legal scholars have relied on these critiques in analyzing *Jespersen*.¹²² For example, feminist scholar Sheila Jeffries posits that “[b]eauty practices show that women are obedient, willing to do their service, and to put effort into that service. They show . . . that women are not simply ‘different,’ but, most importantly, ‘deferential.’”¹²³ Yet despite this radical stance, Jeffries concedes that “[t]here is little research on the reasons why women wear makeup or engage in other forms of ‘grooming,’ the effects that these practices have on women’s feelings about themselves and others, and their interactions with the public world.”¹²⁴ It is therefore difficult to conceive why a court should be responsible for prohibiting appearance standards such as makeup requirements on the basis that they perpetuate stereotypes of women as inferior, when there is inadequate research linking makeup use with female oppression.

In fact, historian Kathy Peiss’ research on the economic enterprise of beauty and its interactions with and influences on cultural and social developments in modern America reveals a far different story.¹²⁵ In discussing the evolution of the beauty business as we know it today, Peiss highlights the important role played by women in small-scale beauty enterprises during the nineteenth century and onward.¹²⁶ According to Peiss, it was the “seamstresses, hairdressers, beauticians, department store buyers, and cosmetics saleswomen” that “made beauty and fashion

¹²² See, e.g., Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2546-47 (1994) (discussing the autonomy- and equality-based critiques of cosmetics set forth in JOANNE FINKELSTEIN, *THE FASHIONED SELF* (1991); JANET R. RICHARDS, *THE SCEPTICAL FEMINIST: A PHILOSOPHICAL ENQUIRY* 182-83 (1980); and NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* 52-53 (1991)); Pizer, *supra* note 65, at 299 (citing the work of “feminist activist” Dana Densmore, *On the Temptation to Be a Beautiful Object*, in *FEMALE LIBERATION: HISTORY AND CURRENT POLITICS* (Roberta Salper ed., Knopf 1972)); Steinle, *supra* note 8, at 294 (also relying on the work of Naomi Wolf and other feminists in arguing that “[m]akeup is deeply offensive and disempowering to some women”) (citation omitted)).

¹²³ SHEILA M. JEFFRIES, *BEAUTY AND MISOGYNY: HARMFUL CULTURAL PRACTICES IN THE WEST* 24 (Routledge 2005).

¹²⁴ *Id.* at 107 (citation omitted).

¹²⁵ See Kathy Peiss, *On Beauty . . . and the History of Business*, in *BEAUTY AND BUSINESS: COMMERCE, GENDER, AND CULTURE IN MODERN AMERICA* 7 (Philip Scranton ed., Routledge 2001).

¹²⁶ *Id.* at 11.

integral to the lives of women,” and these beauty businesses “opened opportunities for . . . women by aligning commercial enterprise with the very ideals of femininity and beauty that had long justified women’s exclusion from most lines of work.”¹²⁷ These female-operated businesses shifted the beauty ideal away from one that “celebrated inner, moral beauty,” and toward a “new emphasis on external appearance and its cultivation through the purchase and use of cosmetics and other beauty aids.”¹²⁸ This account is clearly inconsistent with the feminist critique of “[t]he beauty practices that women engage in” as “those of political subordinates.”¹²⁹ And while there may be some truth to the claim that the cosmetics industry has served to exploit women’s appearance anxieties that stem from our society’s tendency to evaluate a woman’s worth based on beauty,¹³⁰ this position fails to appreciate the complex history of women and makeup use. Kathy Peiss’ extensive exploration of America’s beauty culture reveals a much richer portrayal:

Women have used makeup to declare themselves – to announce their adult status, sexual allure, youthful spirit, political beliefs – and even to proclaim their *right* to self-definition. As in the past, cosmetics offer aesthetic, sensory, and psychological pleasures to those pressed by the obligations of home and work. And women still perceive beautifying as a domain of sociability, creativity, and play.¹³¹

Thus, despite the broad proposition of one eminent legal scholar that “few female-associated dress or appearance conventions exist that are not linked with stereotypes about

¹²⁷ *Id.* at 11-12. For a similar account regarding the importance of women’s identities and social roles in the early development of America’s beauty culture, see Nancy Koehn, *Estée Lauder: Self-Definition and the Modern Cosmetics Market*, in *BEAUTY AND BUSINESS: COMMERCE, GENDER, AND CULTURE IN MODERN AMERICA* 217 (Philip Scranton ed., Routledge 2001). In discussing the role of cosmetics during World War II, Koehn describes how “[w]orking women purchased beauty products to help define their public identities, assert their independence, enjoy themselves, and spend some of the money they were making.” *Id.* at 224

¹²⁸ Peiss, *supra* note 125, at 12.

¹²⁹ JEFFRIES, *supra* note 123, at 24.

¹³⁰ See KATHY PEISS, *HOPE IN A JAR: THE MAKING OF AMERICA’S BEAUTY CULTURE* 4 (Metropolitan Books 1998).

¹³¹ *Id.* at 269.

women that emerged from or have become interwoven with their historically inferior status,”¹³² it is not at all clear that makeup is one of these appearance conventions. This scholar calls for an aggressive approach from the courts in challenging employment practices grounded in community norms, and proposes that courts attempt to “identify the cultural meanings underlying them and determin[e] to what extent they impose burdens that disadvantage a member of one sex in relation to the other.”¹³³ Yet even under this approach, the cultural meanings and attendant burdens associated with makeup use are not so clearly debasing or unfair that the equality concerns of Title VII are plainly implicated in *Jespersen*.

Although the suggestion that makeup use is a marker of long-standing female subordination has been overstated by many critics of *Jespersen*,¹³⁴ this is not to say that such beauty practices fail to reflect any important social conventions whatsoever. Indeed, social science research has consistently found that both men and women who judge photographs of women with and without makeup deem those wearing makeup more physically attractive than those without.¹³⁵ These findings seem to suggest that the makeup policy at issue in *Jespersen* should be interpreted not as reinforcing a sex *stereotype*, but rather as reflecting a societal reality: in our culture, women generally *are* more attractive when wearing makeup

The difference between stereotypes and social truths, albeit nuanced, is nonetheless significant when considering whether Harrah’s makeup policy implicated Title VII concerns. A

¹³² Bartlett, *supra* note 122, at 2570.

¹³³ *Id.* at 2569.

¹³⁴ This misinterpretation of the role of makeup in women’s lives was recognized by sociologists Kirsten Dellinger and Christine L. Williams in their case study on women’s use of makeup in the workplace. The aim of their research was to seek a greater understanding of makeup use “without treating women as cultural dopes of oppressive patriarchal regimes,” unlike most of the “few social researchers who have discussed makeup.” See Kirsten Dellinger & Christine L. Williams, *Makeup at Work: Negotiating Appearance Rules in the Workplace*, 11 GENDER & SOC’Y 151, 153 (1997).

¹³⁵ See Thomas F. Cash et al., *Effects of Cosmetics Use on the Physical Attractiveness and Body Image of American College Women*, 129 J. SOC. PSYCHOL. 349 (2001); Don R. Osborn, *Beauty is as Beauty Does? Makeup and Posture Effects on Physical Attractiveness Judgments*, 26 J. APPLIED SOC. PSYCHOL. 31 (1996).

stereotype is a rigid and simplistic belief about the characteristics of members of some specified social group.¹³⁶ Yet an individual's belief that women are more attractive when wearing makeup is not the type of attitude that constitutes stereotypical thinking – it simply demonstrates that individual's perception of physical attractiveness, and therefore his or her subjective reality. That personal perceptions of beauty are influenced to at least some extent by culturally specific standards¹³⁷ does not make them any less true, nor does it necessarily render such perceptions the product of overly simplistic attitudes which contribute to the type of sex stereotyping protected under Title VII. Therefore, unless Title VII is to be expanded to provide protection against the regulation of employee appearances in general, the fact that businesses recognize that women are generally considered more attractive when wearing makeup is irrelevant for Title VII purposes.

This of course begs the question whether employers' regulation of employees' appearance, and particularly regulation that differentiates on the basis of gender, *should* be prohibited if it conflicts with an employee's autonomy and/or self-identification. Such drastic protection for employees and severe interference into the business judgments of employers not only runs counter to well-established principles of employment law,¹³⁸ but it also sends the false

¹³⁶ 1 John D. Delamater, *Attitudes*, in *ENCYCLOPEDIA OF SOCIOLOGY* 184, 184 (Macmillan Reference USA 2001). According to the author, stereotypes serve several societal functions: they (1) contribute to the formation of social identity, (2) reduce the demands on the perceiver to process information about individual members of a stereotyped group, and (3) justify the political and economic status quo. *Id.* at 185.

¹³⁷ See Peiss, *supra* note 125. In providing a "short disquisition of beauty," Peiss recognizes that "[i]deals of beauty . . . are fundamentally shaped by social relations and institutions, by other cultural categories and practices, and by politics and economics." However, she goes on to explain that "beauty should not be reduced to any one of these: if not autonomous, the aesthetic is a realm with its own language and logic [O]ne only need recognize that beauty ideals, as well as our perceptions and reactions, develop in complex ways." *Id.* at 9. See also DIANE BARTHEL, *PUTTING ON APPEARANCES: GENDER AND ADVERTISING* 185 (Temple University Press 1988) ("The beauty role is neither neat nor simple. Rather, it entails complex forms of cultural participation replete with psychological, social, and ritualistic significance.").

¹³⁸ See Selmi, *supra* note 30, at 483 ("[I]t is fanciful to expect that a court would protect [one's identity or one's expressive self in the workplace] because such protection would seriously encroach upon the formidable employment-at-will rule. One of the basic, if implicit, assumptions behind the employment-at-will principle is that employers have a right to have their employees appear as the employer deems appropriate for the workplace, subject to some limitations."); see also Avery & Crain, *supra* note 8, at 16 (discussing how employment law "defers to managerial prerogative to construct the business image and to control the workforce as the public face of that image").

message that appearances do not matter. Unlike equality of race, sex, religion, and national origin, equality based on appearance has never been a goal of our society,¹³⁹ and it is not the job of the courts to dictate which traits are and are not socially salient and meaningful.¹⁴⁰

IV. AN ARGUMENT AGAINST COMPREHENSIVE REGULATION OF APPEARANCE CODES IN THE WORKPLACE

Given that Darlene Jespersen's opposition to Harrah's makeup requirement could not be validated on the basis of Title VII sex stereotyping, the lingering question underlying the *Jespersen* decision is whether courts should prohibit workplace dress and grooming codes merely because they embrace socially constructed, gender-differentiated appearance norms. I maintain that unless we wish to live in a faceless society whereby natural human interaction is artificially suppressed¹⁴¹ or wish to harm American businesses in order to pursue the questionable goal of transforming the workplace into "a place for expressive activities or a place to pursue our authentic identity,"¹⁴² the answer to this question must be no.

The controversy concerning whether and to what extent employers should be able to enforce mandatory appearance requirements centers around two competing interests: the interest of employers in creating a corporate image that is tailored to consumer preferences, and the interest of employees in "being saved the identity, time, and economic costs involved in adhering to" ¹⁴³ such policies. One approach that would allow employers to regulate employee

¹³⁹ See Selmi, *supra* note 30, at 480 ("Equality based on race, sex, religion, and national origin is now a well-established national aspiration even though we frequently fail to live up to that aspiration. Discrimination based on appearance is not and never has been.").

¹⁴⁰ See Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 17 (2000).

¹⁴¹ See *id.* at 12. Post questions "what it would mean to physically encounter a person and nevertheless to treat him in a way that renders irrelevant his face, voice, body, and gestures." From this perspective, he concludes that "ordinances precluding discrimination based upon appearance are unsettling because they seem to preclude any ordinary form of human interaction." *Id.*

¹⁴² Selmi, *supra* note 30, at 489.

¹⁴³ Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C.L. REV. 379, 383 (2008).

appearances to some degree yet prevent employers from fashioning policies that adopt community-based appearance norms and consequently burden individuals who do not conform to such norms would be to allow only trait-neutral dress and grooming codes. But as one legal scholar has pointed out, employers would likely respond to this constraint by “narrow[ing] the range of trait options available to their employees to only those that the employer [finds] acceptable when possessed by either sex,” thus forcing employees to “converge toward an androgynous mean.”¹⁴⁴ Not only is such androgyny likely to burden individuals of one sex more than the other since there is really no single hair or clothing style that “looks equally good and is equally socially acceptable on women and men,”¹⁴⁵ it also fails to represent an ideal to which our society should aspire.

As noted by Robert Post in discussing the problems associated with “anti-lookism” philosophy,¹⁴⁶ “social relationships characteristically transpire through the medium of appearances.”¹⁴⁷ In only allowing for sex-neutral dress and grooming requirements, the law would put forth the dishonest message that an individual’s face, voice, body and gestures do not constitute critical aspects of that individual’s personhood. Equating nondiscrimination with such strict neutrality not only shrouds society behind a “veil of ignorance” that “strip[s] away all ‘accidents of natural endowment and . . . contingencies of social circumstance,’”¹⁴⁸ but also “diminish[es] the freedom of everyone while increasing that of no one.”¹⁴⁹ Such an outcome

¹⁴⁴ Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 203 (2004).

¹⁴⁵ *Id.*

¹⁴⁶ As described by Post, the goal of “anti-lookism” is to prohibit discrimination on the basis of personal appearance - in other words, “to render appearances invisible.” Post, *supra* note 140, at 2. For an example of one scholar’s proposal that the law should provide a remedy for discrimination based on appearance, see Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033 (2009).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 12 (quoting JOHN RAWLS, A THEORY OF JUSTICE 136 (1971)).

¹⁴⁹ See Yuracko, *supra* note 144, at 203.

would clearly be undesirable for all those affected by this type of stringent appearance code regulation.

A converse approach to the workplace appearance issue would be to ban mandatory dress and grooming requirements altogether so as to allow employees to express their true “social identities”¹⁵⁰ while at work. Although such broad protection for appearance cannot be justified on Title VII grounds¹⁵¹ nor under any other established area of the law,¹⁵² many have argued that the current state of the law is inadequate and should be expanded so as to provide appearance protection in the employment realm.¹⁵³ I argue that this view, although not without merit, nevertheless minimizes the negative impact that such unbridled discretion may have on employers while overstating the value of freedom of dress at work.

¹⁵⁰ See Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111, 1119 (“[A]pppearance is a mark of status, or, more accurately . . . ‘social identity’: the mix of personal and social attributes through which society categorizes people.”).

¹⁵¹ But see generally Green, *supra* note 143. Green distinguishes herself from those scholars who “argue that an individual’s interest in being free from assimilation demands should be recognized as a right to autonomy, liberty, or privacy rather than as an equality concern.” *Id.* at 399. Rather, she maintains that Title VII requires that employers allow their employees to look and dress in any way that signals identification with a protected group. *Id.* at 418. Green argues that such Title VII protection includes, for example, “[a] black man wearing baggy jeans who claims that the jeans signal identification with his racial group” or “a man wearing a dress . . . who claims that the dress . . . signals identifications with his gender group.” *Id.* at 428. She reasons that failing to allow a black man to wear baggy jeans or a cross-dressing man to wear a dress would require them to “cover” their group identities, thus constituting an “employment decision[] based on discomfort with” a trait protected under Title VII. *Id.* at 424. However, I maintain that Green’s interpretation of the contemplated scope of Title VII is overly expansive, and that the employee appearance accommodations that she proposes more closely resemble accommodations that promote individual autonomy rather than ensure equal treatment for protected groups.

¹⁵² See Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 17 (2006).

¹⁵³ See generally KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (Random House 2006) (arguing that our civil rights law should prevent coerced conformity, or “covering,” on the ground that such covering conflicts with the universal desire for authenticity); Fisk, *supra* note 150 (calling for a privacy approach rather than a discrimination approach in analyzing workplace appearance regulation, which would provide freedom from intrusion and protection for autonomy); Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395 (1992) (proposing that current legal doctrine which authorizes employers to determine the appearance of their employees be entirely abandoned and replaced with rules which promote personal autonomy and cultural diversity); Ramachandran, *supra* note 152 (arguing that freedom of dress should be conceived as a fundamental right because neither speech rights nor equal protection provide a sufficient account of the importance of self-presentation).

Of the scholars who propose large-scale reform in the area of appearance protection, most do not place much emphasis on the plight of the employer,¹⁵⁴ or simply refuse to accept that such reform would have a significant effect on the bottom line of many businesses.¹⁵⁵ Yet as previously discussed, the presentation of appearances in everyday life is a vital component of human interaction, and it would be misguided to emphasize the importance of appearance in identity formation but fail to acknowledge that perhaps above all else, appearance is the medium through which we judge one another. As such, employee appearances will undoubtedly affect customer satisfaction rates in service-based industries such as bartending, and the use of dress codes is therefore a significant marketing strategy that is vital to the success of many businesses.¹⁵⁶

At the same time, these scholars who give short thrift to the importance of employee appearances on customer satisfaction levels also view the workplace as an environment in which an employee's identity should be created and expressed, particularly through the mode of dress.¹⁵⁷ For example, Karl E. Klare's argument that the law should eliminate mandatory

¹⁵⁴ See, e.g., Fisk, *supra* note 150.

¹⁵⁵ See, e.g., Green, *supra* note 143, at 427 (“[R]egulation of appearance demands in most cases will impose a relatively limited cost on employers.”).

¹⁵⁶ See Cynthia R. Easterling et al, *Perceived Importance and Usage of Dress Codes Among Organizations That Market Professional Services*, 21 PUB. PERSONNEL MGMT. 211, 211 (1992). The authors assert that “[t]he literature dealing with services lends support to the premise that the dress behavior of employees could be a salient attribute of the buyer when involved in the purchase process of a . . . service,” and explain how the dual characteristics of intangibility and inseparability inherent in service industries “give credence to this postulate.” *Id.* Because services are intangible in nature, “dress behavior . . . can become a tangible evaluative criteria for the buyer, regardless of the relationship dress has to the skills of the [employee] or the quality of the service performed.” *Id.* And because production and consumption of services often “cannot be separated temporally or spatially . . . personal contact exists between the producer and consumer, allowing the buyer to have the perceptual exposure necessary to observe behavioral and physical characteristics of the seller.” For these reasons, each employee in a service organization which has customer/client contact plays a role in marketing that organization's services, and because “dress is an important aspect of that behavior which plays a role in the communication process during this interaction, dress behavior can be a salient factor in the exchange process.” *Id.*

¹⁵⁷ See, e.g., Fisk, *supra* note 150; Klare, *supra* note 153; Ramachandran, *supra* note 152.

appearance policies and instead foster personal autonomy suggests that one goal of this type of reform is to increase the “eroticization” of the workplace.¹⁵⁸ He describes this goal as follows:

Work becomes understood as an arena of personal gratification and self-discovery and particularly a locus for encountering, communicating with, and in some cases forming personal relationships with other people. In this view it would be appropriate that the rules of workplace dress and appearance be relaxed to permit greater on-the-job experimentation, imagination, play, enjoyment and expression of sexual autonomy.¹⁵⁹

However ambitious, this proposition depicts an unrealistic image of the workplace as a place where, once employees are free to dress as they please, autonomy and personal expression will rule the day. Yet “this idea of self-autonomy runs counter to the constraints of the workplace,”¹⁶⁰ and it is difficult to conceive how eliminating dress codes could transform the workplace into an environment in which individuals feel free to, and in fact have the ability to, express their authentic selves.

Although work is an undeniably important aspect of most people’s lives, there is nonetheless a distinct separation between our personal lives and work lives. As noted by Michael Selmi, the workplace is “a place of uniforms and conformity, a place where we go to be someone else, to perform for someone else . . . to earn a living, to make friends perhaps, but more importantly, to earn money that allows [us] to enjoy the other parts of [our] lives.”¹⁶¹ And even if we take the word “uniforms” out of the equation, the result will remain largely unchanged – as perhaps it should. The more we rely upon the workplace to act as a forum for identity, authenticity, or self-expression, the less emphasis we may place on our lives outside of

¹⁵⁸ Klare, *supra* note 153, at 1443.

¹⁵⁹ *Id.*

¹⁶⁰ Selmi, *supra* note 30, at 484.

¹⁶¹ *Id.* at 468, 487.

work.¹⁶² Ultimately, this will only serve to *frustrate* our ability to express our authentic selves, as the intrinsic nature of the workplace can never allow for the type of true freedom that we experience at home.

Dress codes and uniforms may be uncomfortable, confining, at odds with an employee's self-image, or just plain ugly. But in the end, the law's broad approval of employers' reasonable, nondiscriminatory appearance codes best reflects our society's dual interests in providing businesses freedom from undue government interference and ensuring that the liberty and equality rights of citizens are not infringed upon. To argue for complete protection against workplace appearance standards is both an unrealistic and problematic goal which mistakenly equates the ability to control one's public image with the realization of one's authentic identity. We should neither expect nor want the workplace to become the principal forum for the expression of our authentic selves, and should instead appreciate that our "homes," be them literal or figurative, foster and allow us to express our true identities in a way that the workplace never can.

V. CONCLUSION

Darlene Jespersen's tale is not one of triumph, nor is it one that inspires much faith in humanity. Why a loyal, hard-working, and successful employee of over twenty years should be forced out of a job over such a seemingly trivial issue as makeup is a question that lacks a satisfactory answer, and it is difficult to regard Harrah's actions against Jespersen as anything but callous. Jespersen's case was indeed one of hard facts, and the Ninth Circuit's decision

¹⁶² See *id.* at 487. Questioning the merit in treating the workplace as a place that serves personal functions that extend well beyond work, Selmi writes:

If we expect too much from the workplace, if we expect it to be a place where we find our authentic selves, our friends, or our vocation, we might actually find ourselves asking too little of that workplace for fear that we might lose it. We may, in fact, make more demands the less important work is to our lives, the less emphasis we place on work, and the more emphasis we place on our lives outside the workplace.

could have given credence to the adage that hard facts make bad law. Ultimately, however, the *Jespersen* Court stayed true to the law and to its limits in shaping that law, thereby avoiding a more benevolent but legally unsound result.

In recognizing that Jespersen's case failed to establish sufficient evidence of unequal burdens and did not fit within the legal framework of sex stereotyping as set forth in *Price Waterhouse* and thereafter interpreted by the lower courts, the Ninth Circuit properly applied Title VII and its existing body of law to the facts and came to the proper conclusion. Moreover, the court was right to be wary of stretching the law in such a way as to achieve a favorable result for Jespersen, sensitive to the slippery slope that such broad protection against employer appearance codes would likely create. Essentially, had the *Jespersen* decision gone the other way, the Ninth Circuit would have carved out a new area of protection for discrimination based on appearance. Such protection is justifiable neither on legal grounds nor by the interests of society. If courts were to declare all employer appearance requirements unenforceable, they would place an unreasonable burden on employers, particularly those in service-based industries, by demanding that workplaces ignore the importance of appearances in the business world. Rather than force an idealistic yet insincere worldview upon employers whose businesses may be seriously undermined without the ability to regulate the appearance of employees, courts should continue to give deference to employers' reasonable decisions regarding dress and grooming requirements.

Therefore, I ultimately submit that who we are at work does not automatically dictate who we are at home, nor should we necessarily aspire to blur the work/home dichotomy by treating the workplace as a playground for self-expression and identity formation. For in the end, whether makeup-free or caked in cosmetics, Darlene Jespersen had one identity as far as

Harrah's was concerned: that of a bartender. A unique hairstyle or outfit could not have changed that fact. Yet once Jespersen walked out of the casino at the end of each shift, she was no longer a mere bartender. Perhaps she was a daughter, a sister, a friend, a baker, a musician, an avid reader, or a world traveler; she could have been all of these things and more. These things, whatever they may have been, are what constituted Darlene Jespersen's true self, and while her role as a bartender may not have been able to accommodate this authentic identity during work, her true self – the most important of identities – was still waiting for her when she returned home each night.